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No. 74-1461

In the
Supreme Court of the United States
OCTOBER TERM, 1974

PAY MING LEU,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SIDNEY S. ALTMAN and GEORGE KITA
180 W. Washington St., Chicago
CE 6-0666
Attorneys for Pay Ming Leu, Defendant-Appellant.

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No.

PAY MING LEU,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled on February 27, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. A copy of the said opinion is hereto attached as Appendix A.

JURISDICTION

The judgment and opinion of the Court of Appeals was filed on Feb. 27, 1975. Petition for Re-Hearing was

denied on March 18, 1975. An application for extension of time was denied by notation on April 18, 1975, with notification by letter dated April 21, 1975; a reapplication to another justice was returned with advice that Petition may be filled, but its untimeliness will be noted.

QUESTIONS PRESENTED

1. Whether the mere writing of a prescription can be construed as an Attempt to dispense; or, to Attempt to Aid and Abet another to dispense without having the prescription filled.
2. Whether the mere writing of a prescription is any kind of a crime where the prescription is never filled; or, attempted to be filled.
3. Whether the language in Section 812 concerning the dangers and the use and non-use of controlled substances compared to hard drugs, was improperly included in an Instruction.
4. Whether there has been issue preclusion because of the acquittal on the first 11 counts of the 30-count indictment which are identical in the substance of the charge.
5. Whether adverse publicity influenced the jury.
6. Whether the court should have dismissed the indictment or ordered a New Trial when it was discovered that the government was withholding vital information, which it had refused defendant, when requested in Bill of Particulars.
7. Whether the antics of the government witnesses turned the prosecution into a "sporting event and not a quest for truth".

8. Whether over-prescribing drugs, not in any particular instance, but as an over-all result, is a matter for the State's policing powers.

APPLICABLE STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Title 21, Section 841, U.S.C.A., as it pertains to punishment, which is now a matter pending before this court in *United States* v. *Moore*, 505 F2 426 (cert. granted 2/18/75); Sec. 802(10) the definition of a dispenser as it applies to a practitioner, and the construction of "ultimate user" which in the *United States* v. *Bartee* case were agents, and in the instant case, nobody at all. Also, whether the "guidelines" in Sec. 812, (footnote 17 of opinion) are proper as an instruction for the reasons given in footnote 23.

STATEMENT OF CASE

Petitioner, Defendant and Appellant in the Courts below, is Doctor Pay Ming Leu, a Chinese alien who was practicing medicine in the black "ghetto", area on West Madison Street in Chicago, Illinois, where many of his patients were undesirables suffering from depression or inability to sleep. Dr. Leu, registered by the Federal Administrative Agency to dispense controlled substances, did so to a relatively large extent, considering the need and the area. Because of the records, the State authorities, resenting what they considered a lucrative practice, and seeking favorable publicity from both a State Legislative Commission inquiry and whatever rewards might accrue from a Federal conviction, proceeded to compromise Dr. Leu by plans emanating from the Superintendent's office which in the words of one agent was "how to get Dr. Leu to break the law." The chief agent, Edward Doyle, employed by the State, and Eddie Brown, Federal agent,

plus other State and Federal agents, hung around the large waiting room of Dr. Leu's office, formulating their plans to get him to over-prescribe. However, when it was discovered that Dr. Leu was scrupulous in limiting the quantity of the controlled substances and giving physical examinations, they were advised by their supervisor to assume aliases, and many of the agents did so, but agents Hamilton and White were not witnesses at the trial although there was proof that they also had been hanging around the office and had previously used these aliases. Because of the proof that Dr. Leu had made initial examinations and was circumspect in his prescribing, the jury acquitted Dr. Leu of the first 11 counts which were substantive charges of the crime set forth in Section 841(a).

However, because of the injection of the alias factor, and its concomitant aura of guilt inference, the jury found Dr. Leu guilty of the subsequent 19 charges, all of which were Attempts not by any dispensing but by the mere writing of the prescriptions.

Apparently, because of the use of aliases (not the ones used by Dr. Suarez, footnote 9, A. 4a) the agents did not present the prescriptions to a pharmacist. This was the reason for filing a Superseding Indictment in which the charge from counts 12 to including 30 were changed from Dispensing to Attempting to Dispense, and the corpus delicti changed from "not in good faith" to "not in the course of professional practise," This necessitated a new and additional effort to obtain discovery information, but defendant was compelled to stand trial within 10 days. Previous Motion for Discovery and Bill of Particulars, asking for names of persons present at the time and place in each indictment, was not answered despite Supreme Court decision in *Will* v. *United States,* 88 S.Ct. 269

(1967). The information given was of nebulous value, consisting of statements presumably made by Dr. Leu on these occasions to an agent (without giving any names), and photo-copies of the face of prescriptions, but not the back-side containing initial of various agents.

In order to further stymie the investigation of the defendant, the receptionist who in many instances wrote the names of the purported patients (who, incidentally, did not include any of Dr. Leu's actual patients) and who was then instrumental in identifying these purported patients, which turned out to be aliases of only 2 witnesses when there was all indication of at least twice that number. The receptionist disappeared and could not be located. Dr. Leu is presently incarcerated.

REASON FOR GRANTING THE WRIT

Doctors in the United States are presently complaining that they are held liable for errors in judgment in the malpractice cases which include the prescribing of drugs, whereas Dr. Leu, and many others, are being convicted because some jury felt they were derelict in "their professional practise" which could be the failure to make an examination or diagnosis to please the "Federal prosecutors as to what constitutes appropriate methods of medical practice." (footnote 17, A. 13a) It is further said that "this section will provide guidelines * * * (so) Those physicians who comply * * * will no longer jeopardize their professional careers by accepting narcotic addicts as patients". Dr. Leu prescribed mere pills to combat depression and he was convicted, mainly, because the trial court read one of those "guidelines" to associate Ritalin, Tuinal and Desoxyn (amphetamines) and Seconal (a barbituate) Schedule II and III drugs, not physiologically addictive, with the pernicious drugs in Schedule I,

in an instruction that says "A Schedule I substance is a drug or other substance which has a high potential for abuse, has no currently accepted medical use in the United States, and there is a lack of accepted safety for its use under medical supervision". (Footnote 23, A. 19a)

Yet, the opening paragraph of Sec. 801(1) reads: "Many of the drugs included within this subchapter have useful and legitimate medical purposes and are necessary to maintain the health and general welfare of American people."

The prosecution's dilemma begins with Count 12 of the Superseding Indictment because that it where the agents began using aliases, which the average American should have detected, but they forgot to cash in their prescriptions. So the fiction of attempting to dispense is resorted to, and physicians become dispensers, or in aid thereof, by the mere act of writing a prescription. At the suggestion of the government the court adopts a rule, which is not an enunciation of principal, but a yardstick to determine what degree of conduct on the part of a prescribing physician "brings him nearer the crime (dispensing) he intends to commit" when his prescription was never presented to a pharmacist.

The opinion admits that "a prescription must be filled to complete the crime of dispensing a controlled substance as defined by sec. 841 (a)***(However) it seems to us clear that a prescription need not be filled to make out a case of attempting to dispense against a physician." (A. 19a)

The opinion defines the "term dispense (as) requiring that practitioner be involved either delivering, ordering or prescribing a controlled substance", but Sec. 802(10), the basis for the definition, goes further and requires "de-

livery (not of a prescription, but) a controlled substance to an ultimate user." Then, and only then, can the prescribing be included in the crime of dispensing."

There are numerous cases that hold "prescribing is no part of a sale (dispensing). *Aiton* v. *United States,* 3 F.2d 992 (9th Cir. 1925); *Boehm* v. *United States,* 21 F.2d 283 (8th Cir. 1927).

Therefore, how can there be an attempt of a non-commitable crime by a physician, acting alone.

We find in *Mitchell* v. *United States* (3 F.2d 514) the statement that "a doctor who issues a prescription, which is filled, thereby participates in or aids and abets a sale." Thus, the actions of the defendant, Dr. Pay Ming Leu, are at most actions of aiding and abetting. As the *Mitchell* v. *U.S.* case further points out, "The allegation of sale or delivery implies a completed act, and when it is said that there was a sale through a prescription, it is, in effect, said that the prescription was filled."

But, in exporing the possibility of Dr. Leu being an aider or abettor, we find it requires someone to make the attempt.

In Columbia Law Review, Volume 61: 571, p. 613, it is stated:

> "It is clear under existing law that if one aids and abets * * * another to commit an offense, he is liable for any attempt made by the *latter.*" (Emphasis added).

The article goes on to say:

> "but there has been little litigation concerning liability by conduct designed to aid another to commit a crime when the crime is not committed or attempted by the other person."

In the instant case the witnesses, Brown and Doyle, did not make an attempt to have the prescriptions filled.

In order to utilize current publicity the trial was coordinated with the conviction of Dr. Suarez et al., even to the extent of denying further discovery on the new indictment so that announcements of the scheduled Suarez sentencing ("for running prescription mills"), less than 2 weeks later, were telecast on the morning when the government's key witnesses took the stand against Dr. Leu, who the jury was told was "running a prescription mill." (Footnote 25, A. 22a)

Yet, despite all this, the jury acquitted Dr. Leu on the substantive charges, Counts 1 to and including 11, where the prescriptions were actually filled. During that period of time, both Brown and Doyle (as DeGrazia) were examined and records made.

Doyle, a state legislative agent, led the raid of Federal agents on Dr. Leu's office, during which his medical record, as well as the rubber stamp Dr. Leu used on the charts, disappeared. Doyle, under the first of his appearances slumped in his chair and gave every appearance of a depressive. He did not say, at that time, he was going to sell methylphemidate in Canada, but that he needed medication for himself. At his last visit, when he taunted Dr. Leu about selling prescriptions, Dr. Leu shouted: "You no come back here! I no have medicine for you."

Hardly the remark of a man reputed to use expressions like "cash and carry" and everyone "has to make a living."

With Agent Brown, the statement of selling also came at the end of his series of visits. His original examination was charted, and he "wanted to get high at a party."

The jury apparently felt Dr. Leu was guilty because he issued prescriptions to people he supposedly knew were not using their right name. Yet, there is nothing in the law regarding the use of an alias. Sec. 802(20) even allows prescriptions to be issued for household pets and other members of the family.

As we pointed out in our reply brief,

> The government in its explanation of the "arguable inconsistency in the verdicts" refers to "purchases made in frequent intervals and under both male and female *assumed* names" (emphasis ours; U.S. Brief, p. 29) which agrees with our alias theory, but avoids the very substantial issue that of issue preclusion, which the opinion also considers as "inconsistent verdicts." (See footnote 24, A. 20a)

In the order approving the new Criminal Rules, Mr. Justice Douglas said, "*** a civilized society ought not to tolerate the conduct of a criminal prosecution as a 'game'." The reference is to the article by Justice Brennan, the Criminal Prosecution: Sporting Event or Quest for Truth? (1968) Federal Sules of Criminal Procedure, West Publishing Co., page 8.

In *Will* v. *United States*, 88 S.Ct Rep. 269, 389 U.S. 90 (no. 36-Oct. Term, 1967) in which Judge Will of the U. S. District Court of the Northern District of Illinois, sought an expression from the Supreme Court regarding the trial court's power to force the Government to produce a list of prosecution witnesses under Rule 7 (f) of the Federal Rules of Criminal Procedure (p. 2 of Opinion) that court affimed "it is not uncommon for the Government to be required to disclose the names of some potential witnessee in a Bill of Particulars, where this information is necessary or useful in the de-

fendant's preparation for trial." (p. 9); citing *U.S.* v. ***White,*** 370 F.2d 559 (CA 7th Cir. 1966).

The Supreme Court also said, "The reason for requiring disclosure of other names . . . . is not that they will or may be witnesses, but that the defendant requires identification of the times, places, and persons present in order to prepare his defense." (page 11).

In the instant case, if defendant had known it was the government's contention that the names in his office records were Brown and Doyle aliases, with the possible exception of agents Hamilton and White, he would have subpoenaed the latter and made an effort to determine the existence or non-existence of the former, and possibly the receptionist, with the help of the government, would have been present in the courtroom to aid in the administration of justice. (See "fictitous names," f. 24, A. 21a).

Page 11A of the Opinion states:

> Finally, the legislative history of the Controlled Substances Act substantiates our position. The present Act replaced the Harrison Narcotics Act of 1914, 38 Stat. 785 (1914), the prohibitions of which (against dispensing narcotics) were applied to registered physicians who acted beyond the course of their professional practice, *United States* v. *Behrman,* 258 U.S. 280 (1922); *Jin Fuey Moy* v. *United States,* 254 U.S. 189 (1920); *United States* v. *Doremus,* 249 U.S. 86 (1919).

We agreed. But the government, in its Brief, contended that since the Harrison Narcotics Act was repealed the "notion that a physician is immunized from the law (protection from prosecutors) by the veil of a prescription has been soundly repudiated". It is the defendant, and not the government, who relied on the *Behrman* and *Doremus*

cases not for immunity, but medical freedom. We cited these cases in our Petition For Rehearing:

> The Supreme Court in United States v. Doremus, 249 U.S. 86, 88, stated "that physicians dispensing the drugs directly should do so only to 'patients' treated in the course of professional practice, and that druggists should dispense the drugs only on 'prescription' issued by physicians, and that neither of them should procure the drugs on order forms for any purpose other than the distribution of them to *bona fide* consumers—that is, genuine patients of a physician." (emphasis added) "In United States v. Behrman, supra, it was only the extraordinary quantity of the drug dispensed that enable the court to find in the acts charged in the indictment an infraction of the law." Linder v. United States, 268 U.S. 59). Dr. Leu did not over-prescribe in any one count.

The Moore case, if affirmed by this court, would merely reduce the sentence, but we maintain that the black-ghetto area, where all the convictions take place, is being shunted by the Federal prosecutors to government sponsored Clinics, where these poor unfortunates can be exploited and successful drugs, like Methadone, denied the public pharmacies.

We feel that the welfare of the country, as expressed by the Congress, would best be served by issuing a rebuke to prosecutors, who use every means to get doctors to "break the law" as Agent Brown admitted was the purpose of his conferences with his supervisor, Ron Lattig. (Tr. 133)

CONCLUSION

For the reasons severally and collectively assigned here it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

SIDNEY S. ALTMAN and GEORGE KITA
180 W. Washington St., Chicago
CE 6-0666
Attorneys for Pay Ming Leu
Defendant-Appellant

APPENDIX

Nos. 74-1428, 74-1433, 74-1435

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CLIFFORD T. GREEN, VALERIANO SUAREZ and HENRY G. FORT,

Defendants-Appellants.

and

Nos. 74-1420, 74-1468

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAY MING LEU,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 73 CR 420 and No. 74 CR 343
PHILIP W. TONE and FRANK J. MCGARR, *Judges.*

ARGUED JANUARY 6, 1975 — DECIDED FEBRUARY 27, 1975

Before FAIRCHILD, *Chief Judge*, STEVENS and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* These consolidated appeals raise the same principal issue: whether indictments against physicians and a pharmacist (registrants under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*) for the dispensing or distributing of controlled substances pursuant to prescriptions allegedly issued without a legitimate medical purpose or outside the usual course

of professional practice, properly charge crimes under 21 U.S.C. § 841(a)[1] and 21 C.F.R. § 306.04(a).[2]

I

In 74-1428, et al., the defendants below were: Valeriano Suarez, a physician who practiced at the Central West Medical Center located on the eighth floor of a building at 2400 West Madison, Chicago, Illinois; James McClure, a physician who assisted Dr. Suarez on a part-time basis at the medical center;[3] Clifford T. Green, a pharmacist and part-owner of the Afro-American Pharmacy located across the hall from the medical center and Henry G. Fort, part-owner of the pharmacy and owner of the building.

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[1] 21 U.S.C. § 841 provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

[2] 21 C.F.R. § 306.04 provides:

> (a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances. . . .

[3] Dr. McClure was found not guilty by the jury and accordingly is not presently before this court.

In June 1973, a grand jury returned a 33 count indictment against the defendants.[4] Count I charged that a conspiracy existed between the defendants to dispense controlled substances pursuant to prescriptions which would be issued without a legitimate medical purpose and to distribute controlled substances pursuant to prescriptions which they knew to be issued neither in the usual course of professional treatment nor for a legitimate medical purpose in violation of 21 U.S.C. § 841(a)(1) and 21 C.F.R. § 306.04(a).

In addition to the conspiracy count, 27 of the remaining 32 counts are on appeal.[5] Seventeen substantive counts charged Dr. Suarez for knowingly and intentionally dispensing on or about specified dates Schedule II and III controlled substances without a legitimate medical purpose,[6] and ten substantive counts charged Green for knowingly and intentionally distributing on or about specified dates Schedule II controlled substances pursuant to prescriptions which he knew were issued

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[4] Originally there had been a 30 count indictment against the four defendants. This was dismissed on the government's own motion and superseded by the present indictment.

[5] Count 2 indicted Green for knowingly and intentionally furnishing a material false statement to the Registration Branch of the Bureau of Narcotics and Dangerous Drugs. This count was severed and eventually dismissed by the government after Green's conviction.

Count 9 charged Dr. Suarez with dispensing a Schedule III controlled substance without a legitimate medical purpose. He was found not guilty of this count.

Counts 31-33 indicted Dr. McClure for illegally dispensing Schedule III controlled substances without a legitimate medical purpose. These counts are not before us.

[6] Counts 3-8, 10-13, 18, 20, 21, 24-27. All but Counts 5 and 7 alleged dispensing of Schedule II controlled substances.

neither in the usual course of professional treatment nor for a legitimate medical purpose.[7] The controlled substances which constitute the basis for the bulk of the charges are: Ritalin, Desbutal, Doriden, and Tuinal.[8] After a jury finding of guilty, Suarez was sentenced to five years, Green to three years and Fort to one year imprisonment. In addition, all were given special parole terms of two years.

Numerous individuals, some of whom were government agents, testified that they would come to the medical clinic, receive minimal, if any, professional medical treatment and would be given upon request one or more prescriptions, either in their own or a fictitious name, for substances described in the indictment. They would then proceed across the hall and have their prescriptions filled without questioning by defendant Green. Some witnesses testified to coming in once a week under different names and receiving prescriptions on each occasion. This was supported by medical files which contained more than one name on them. There was also evidence that there were names of famous individuals[9] appearing on

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[7] Counts 14-17, 19, 22, 23, 28-30.

[8] The government offered the following description for these substances:

> RITALIN—a trade name for a tablet containing methylphenidate, a Schedule II controlled substance.
> DESBUTAL—a trade name for a capsule containing methamiphetamine, also a Schedule II controlled substance.
> DORIDEN—a trade name for capsules or tablets containing glutethmide, a Schedule III controlled substance.
> TUINAL—a trade name for tablets or capsules containing sodium amoborbital and sodium secoborbital, also a Schedule III controlled substance.

[9] Such names as Lana Turner, Mark Twain, Spencer Tracy, Loretta Young, Joan Crawford, Ralph Nader, Karl Malden, Peter Fonda, Peter Lorre, Lena Horne, Carl Stokes, Celeste Holm, Lawrence Welk, Aretha Franklin, Rosaline Russell, and Pablo Casales.

prescriptions for controlled substances written by Dr. Suarez and filled at the Afro-American Pharmacy. These individuals neither received the controlled substances prescribed nor were medical files containing their names found at the medical center.

Other corroborating evidence of wrongdoing by the defendants included the existence of the no refill for fifteen days rule established by Dr. Suarez. Most patients, who paid $10 per visit, were given prescriptions that would last them fifteen days. Jackie Hunter, receptionist and office manager of the clinic, testified that there were certain preferred patients who did not have to abide by the "fifteen day rule" and who could usually purchase multiple prescriptions. Ms. Hunter also testified that she overheard a conversation where Green was cautioning Dr. Suarez about prescribing too much medication for a particular individual. There was also evidence that a direct telephone line was set up from Dr. Suarez' office to the pharmacy owned by Green and Fort. Ms. Hunter testified that Green and Fort complained that Suarez was not using the telephone often enough to call prescriptions directly in, and that because of this sales were being lost to other pharmacies. Finally, Fort and Hunter had a guard placed near the pharmacy with directions to prevent individuals from entering the pharmacy unless they had a prescription and with directions to prevent the selling of medication in the lobby.

Defendants Suarez and Green challenge their convictions on the grounds that as individuals subject to registration under the Controlled Substances Act, they are not subject to conviction under 21 U.S.C. § 841(a) which was the basis for the indictment. *United States* v. *Moore*, 505 F.2d 426 (D.C. Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (U.S. Feb. 18, 1975). Furthermore, all the defendants argue that the indictment in the present case is dependent on a regulation that was promulgated without authority and that impermissibly expands the range of proscribed activities beyond what the statute itself makes

criminal. Finally, defendant Fort raises a sufficiency of the evidence claim.

II

In 74-1468[10] the defendant is Pay Ming Leu, a physician who practiced medicine on Chicago's west side. Dr. Leu was charged in an indictment returned in April 1974. Counts 1-11 charged that he knowingly and intentionally dispensed Schedule II and III controlled substances pursuant to prescriptions not written in the course of professional practice in violation of 21 U.S.C. § 841(a)(1), and Counts 12-30 charged that he knowingly and intentionally attempted to dispense Schedule II and III controlled substances pursuant to prescriptions not written in the course of professional practice in violation of 21 U.S.C. §§ 841(a)(1), 846. Dr. Leu was found not guilty of Counts 1-11 (dispensing) and guilty of Counts 12-30 (attempting to dispense). He was sentenced to five consecutive one year prison terms[11] which are the subject of this appeal.

The primary evidence against Dr. Leu was the testimony of three agents of the Drug Enforcement Administration and one agent from the Illinois Legislative Investigating Commission. These agents each described circumstances in which Dr. Leu sold them prescriptions for controlled substances. Agent Ward testified that he went to Dr. Leu for the first time on April 19, 1973 and asked to buy $100 worth of Ritalin. Dr. Leu said he could only give him a prescription for 90 pills. Five days later Ward asked for, but was refused another prescription for Ritalin because he was "too early," but after

[10] No. 74-1420 was an appeal from the district judge's denial of bond pending appeal. An emergency motion by the defendant requesting injunctive relief was denied by this court on May 29, 1974.

[11] The sentence was subsequently modified because conviction under 21 U.S.C. §§ 841, 846 requires the imposition of a special parole term. This was set at three years.

asking then instead for Seconal, he was given a prescription for a similar drug called Tuinal. Agent Ward returned thereafter and picked up other prescriptions. At no time was any physical examination given or a medical history taken.

Agent Adams testified that he told Dr. Leu that he was not kicking any habit, but just wanted to buy some Ritalin to get high. Dr. Leu then gave him a prescription for 90 pills in exchange for $20. On his next visit Adams received prescriptions for Ritalin and Seconal.

Agent Doyle went to Dr. Leu in September 1973, and explained that since July, when he had last seen Dr. Leu, he had been in Canada selling Methylphenidate (active ingredient in Ritalin). Dr. Leu wrote a prescription for Desoxyn in the name of Eddie DeGrazia (Doyle's undercover name) and although he would not write one for Ritalin to the same person, he did write one in another name, known by Dr. Leu not to be Doyle's real name. Agent Doyle told Dr. Leu that he never used Ritalin, but he just sold it to which the doctor replied: "Everybody has to make a living." Shortly thereafter Doyle asked for and received two 90 pill Ritalin prescriptions made out in the names of Ronald Henry and Thomas Sexton. A few days later Doyle purchased two more prescriptions under new names. He was at no time examined by Dr. Leu.

Agent Brown first visited Dr. Leu's office on April 19, 1973 and asked for and received a prescription in the name of Arnie Wilson for Ritalin and Seconal because he was having a party. Two weeks later he bought prescriptions in the name of Eddie Brown. Agent Brown subsequently returned and got prescriptions in the name of Bonnie Hill, Billy Brown, Lenora Brown, Lenora Wilson and Glenn Gray. Brown had told Dr. Leu that he was selling the pills.

Dr. Leu challenges his conviction on the same grounds as the defendant-doctor in 74-1428. In addition, Dr. Leu

argues that his conviction should be reversed on the grounds that certain instructions to the jury were erroneous; that the evidence was insufficient to make out an attempt case where the prescriptions were never filled; that certain expert opinion evidence invaded the province of the jury; and that there was excessive pretrial publicity and the evidence was insufficient to sustain the conviction.

III

The principal issue raised by the defendant-physicians in both cases is that they are not subject to conviction under 21 U.S.C. § 841(a)(1) because of their status as registrants.[12] The thrust of defendants' argument is premised on Chief Judge Bazelon's decision for a divided court in *United States* v. *Moore*, 505 F.2d 426 (D.C. Cir. 1974), *cert. granted*, 43 U.S.L.W. 3445 (U.S. Feb. 18, 1975). The court opined that Congress in enacting the Controlled Substances Act was distinguishing between the registrant and non-registrant in determining whether the penalty provisions of 21 U.S.C. §§ 842, 843 were to apply or the more severe sanctions of 21 U.S.C. § 841 were applicable. As the court said:

> In contrast to §§ 842 and 843, § 841 does not mention "registrants" as the focus of any of its provisions. It provides for sentences of up to 15 years and fines of up to $25,000. This broad outline strongly suggests that Congress intended to deal with registrants primarily through a system of administrative controls, delying on modest penalty provisions to enforce those controls, and reserving the severe

[12] It is not entirely clear from the record whether Green (pharmacist) is a registrant under the act. It would seem that 21 U.S.C. § 822 would require him to register in order to be able to lawfully distribute controlled substances. In any case because of our disposition of the *Moore* case issue, whether Green was registered or not becomes irrelevant.

penalties provided for in § 841 for those seeking to avoid regulation entirely by not registering.

Moore, supra at 430.

Prior to *Moore* it was unanimously held that physicians who were registrants could be liable under 21 U.S.C. § 841 if they prescribed controlled substances outside the course of professional practice. *United States* v. *Larson*, slip op. No. 73-3109 (9th Cir., May 22, 1974); *United States* v. *Badia*, 490 F.2d 296 (1st Cir. 1973); *United States* v. *Jobe*, 487 F.2d 268 (10th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *United States* v. *Leigh*, 487 F.2d 206 (5th Cir. 1973); *United States* v. *Bartee*, 479 F.2d 484 (10th Cir. 1973); *United States* v. *Collier*, 478 F.2d 268 (5th Cir. 1973).[13] For the following reasons we respectfully decline to follow the majority holding in *Moore* and we find ourselves instead persuaded by Judge MacKinnon's dissent and the earlier precedents.

We agree with the *Moore* majority that Congress in some respects intended to treat physician-registrants differently from non-registrants. We do not agree, however, that registrants were to be totally immune from the sanctions imposed by section 841. Insofar as registrants are guilty of technical violations (e.g., use of oral prescription when written one is required; dispensation of controlled substances for which he is not authorized to another registrant; distribution of controlled substances without the proper label; failure to keep proper records; distribution pursuant to an im-

[13] The theories for finding physicians liable under 21 U.S.C. § 841 were varied. Thus, in *United States* v. *Leigh*, 487 F.2d 206 (5th Cir. 1973), the court held that an indictment charging "distributing" by a physician instead of "dispensing" was invalid, while in *United States* v. *Badia*, 490 F.2d 296 (1st Cir. 1973), the court held that a physician was guilty of "distributing" rather than "dispensing" because as a registrant he could only be "dispensing" if he was in fact acting within the course of professional practice.

proper order form; use of improper registration number) in their day-to-day dealings with controlled substances in accordance with their professional responsibilities, they are liable only for the lesser penalties of sections 842 and 843. When, however, a physician acts without any legitimate medical purpose and beyond the course of professional practice by selling prescriptions that allow the bearer to obtain controlled substances, his conduct should be treated like that of any street-corner pill-pusher.

Section 841 makes it "unlawful for *any* person . . . to distribute or dispense controlled substances . . . ." That prohibition is absolute unless otherwise "authorized by [the] subchapter." We deem it to be significant that the exception refers only to a distributing or dispensing that is authorized by the subchapter rather than a broader exception which would totally exempt all registrants.[14] Furthermore, the definition of the term dispense requires that a practitioner be involved either in delivering, ordering or prescribing a controlled substance. 21 U.S.C. § 802(10). A practitioner is one registered or one otherwise permitted by the United States or a state to dispense or administer a controlled substance. 21 U.S.C. § 802(20). Thus, it is clear that when 21 U.S.C. § 841(a) refers to "dispense," it can only mean that physicians as well as other practitioners are subject to the sanctions of that section if their actions are not authorized by the subchapter.

There is another example of internal inconsistency that follows from a holding that section 841(a) does not apply to registered physicians. If a registrant distributed a controlled substance without using the proper order form or in any manner that violated 21 U.S.C. § 843 (technical violations including use of fictitious registration number; acquisition of controlled substances through misrepresentation; furnishing false information on docu-

[14] The question of what type of distributions and dispensations are authorized is discussed *infra*.

ments required to be kept or filed and making of equipment designed to reproduce drug trade names fraudulently) he could receive up to four years imprisonment for an initial violation. A violation of the type charged in these cases, selling of prescriptions without a legitimate medical purpose, would, according to the *Moore* theory, be cognizable only under 21 U.S.C. § 842 (since section 841 would be unavailable and the charge is not covered by section 843). A violation of section 842 carries only a one year imprisonment term for initial violations. This would mean that a physician who knowingly wrote prescriptions to anyone on demand would receive at most a one year sentence, while his colleague who failed to use a proper order form could receive up to four years imprisonment. We do not believe that Congress intended such a result.

Furthermore, our judgment is supported by looking closely at section 842(a)(1), the section *Moore* would rely on for this action in lieu of section 841. Section 842(a)(1) makes it unlawful for a registrant to dispense a controlled substance in violation of 21 U.S.C. § 829. Section 829 refers to the situations when a physician is required to use either a written or oral prescription, and directs the form that the prescription is to take. It does not specifically deal with the problem of the issuance of prescriptions without any medical justification. The fact that section 842(a)(1) may have been violated by the defendant-physicians[15] does not preclude the possibility that they are liable under another section carrying more severe sanctions.

Finally, the legislative history of the Controlled Substances Act substantiates our position. The present Act replaced the Harrison Narcotics Act of 1914, 38 Stat. 785 (1914), the prohibitions of which (against dispensing narcotics) were applied to registered physicians who

[15] *See Moore, supra,* 505 F.2d at 452 n.10 (MacKinnon, J. dissenting).

acted beyond the course of their professional practice. *United States* v. *Behrman*, 258 U.S. 280 (1922); *Jin Fuey Moy* v. *United States*, 254 U.S. 189 (1920); *United States* v. *Doremus*, 249 U.S. 86 (1919).

We have neither been directed to nor have we discovered a substantial basis in the legislative history that convinces us that physicians were not to be liable under section 841 as they were under the Harrison Act for dispensing controlled substances outside the course of their professional practice. While it is true to some degree that the Harrison Act was thought inadequate with regard to defining precisely the liability of physicians,[16]

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[16] As quoted from the Prettyman Commission of 1963 in the House Report accompanying the Controlled Substances Act:

> Since the passage of the Harrison Act of 1914, the Federal narcotics laws have expressly permitted a physician to prescribe narcotic drugs for a patient in the course of "professional practice only" and for "legitimate medical uses" and "legitimate medical purposes." Under this statutory language there is no doubt that a physician may prescribe narcotic drugs for a patient suffering acute pain or from a painful and incurable disease. But a controversy has existed for 50 years over the extent to which narcotic drugs may be administered to an addict solely because he is an addict.
>
> During the first 10 years following enactment of the Harrison Act, the Supreme Court affirmed several convictions under the act involving the indiscriminate prescribing of narcotic drugs for addicts. In 1925, however, in *Linder* v. *United States*, 45 S. Ct. 446, 268 U.S. 5, 69 L.Ed. 819, the Court indicated that the dispensing of narcotic drugs by a physician for the purpose of relieving conditions incident to addiction was not in every instance a violation of the act. . . .
>
> The regulations of the Bureau of Narcotics, however, do not seem to be in accord with [Linder] . . . .
>
> The practicing physician has thus been confused

this goal was accomplished in the Controlled Substances Act through the gradations of sanctions provided by sections 841-843 and by empowering the Attorney General to promulgate regulations to define more precisely what constitutes authorized dispensing. 21 U.S.C. §§ 821, 871(b).[17] It was not accomplished, as the *Moore* court holds, by exempting physicans from the sanctions of section 841.

The language in the legislative history relied on by the *Moore* court to conclude that physicians were not to

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[19] (Continued)

> as to when he may prescribe narcotic drugs for an addict. Out of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts except occasionally in a withdrawal regiment lasting no longer than a few weeks. In most instances they shun addicts as patients.

H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., U.S. Code, Cong. & Admin. News 4566, 4580 (1970).

[17] As stated by the House Report accompanying the Act:

> Although the committee is concerned about the appropriateness of having Federal officials determine the appropriate method of the practice of medicine, it is necessary to recognize that for the last 50 years this is precisely what has happened, through criminal prosecution of physicians whose methods of prescribing narcotic drugs have not conformed to the opinions of Federal prosecutors of what constitutes appropriate methods of professional practice. In view of this situation, this section will provide guidelines, determined by the principal health agency of the Federal Government, after consultation with appropriate national professional organizations. Those physicians who comply with the recommendations made by the Secretary will no longer jeopardize their professional careers by accepting narcotic addicts as patients.

H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., U.S. Code, Cong. & Admin. News 4566, 4581 (1970).

be included within the coverage of section 841 is in our view too general to justify that conclusion. The congressional purpose behind section 841 was to get the drug dealer no matter who he might be, and to prevent diversion of legitimately produced controlled substances into illicit channels.[18] One of the major sources of this illicit diversion is from registrants who have relatively easy access to controlled substances. Certainly Congress did not intend to immunize such individuals from prosecution under section 841.

We hold that section 841 does not exclude physicians from its coverage.

IV

It is next necessary to consider precisely what type of dispensing or distributing is authorized by the exception clause of section 841. All the defendants in both consolidated appeals argue that charges against them are based on an invalidly promulgated regulation that expands too broadly the conduct considered impermissible under section 841. The challenged regulation is 21 C.F.R. § 306.04(a) which provides that a prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by a practitioner acting in

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[18] The House Report accompanying the Act stated:

> With regard to the stimulant and depressant drugs, now regulated under the Federal Food, Drug, and Cosmetic Act as amended by the Drug Abuse Control Amendments of 1965 and in 1968, it should be noted that as estimated in a report by this committee in March of 1965 on the Drug Abuse Control Amendments of 1965, almost 50 percent of the 9 billion amphetamines and barbiturates produced legitimately in this country were diverted into illicit channels. As of late 1969, when that diversion figure was rechecked, it was still accurate.

H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., U.S. Code, Cong. & Admin. News 4566, 4581 (1970).

the usual course of his professional practice. The phrase "legitimate medical purpose" is not used in section 841 (a) but is used in the indictments, and that discrepancy is the basis of the defendants' challenge.

In our view, the challenged regulation has been validly enacted and does not expand the criminal statute. Section 841(a)(1) makes it unlawful to dispense or distribute controlled substances "except as authorized by this subchapter." 21 U.S.C. § 822(b) provides that registrants are allowed to dispense controlled substances "to the extent authorized by their registration and in conformity with the other provisions of this subchapter." Two of the provisions of the subchapter are 21 U.S.C. § 821 and § 871(b). Section 821 provides that "[t]he Attorney General is authorized to promulgate rules and regulations . . . relating to the . . . control of the . . . distribution and dispensing of controlled substances." Similarly, section 871(b) provides that "[t]he Attorney General may promulgate . . . regulations . . . for the efficient execution of his functions under this subchapter." It is pursuant to that authority that 21 C.F.R. § 306.04(a) was promulgated. Thus, it is clear that the prescriptions involved in the present cases were not effective because they were not issued for a legitimate medical purpose. The exemption from section 841(a) is applicable only if the action of the practitioners is authorized. Since there was no lawful prescription ever written, it follows that section 829 has not been complied with[19] and the dispensing of the controlled substances in these cases has not been authorized. This interpretation does not expand

[19] It is true that section 842 provides penalties for registrants who fail to comply with section 829. This, however, refers to specific technical violations of section 829 and of 21 U.S.C. § 353(b) which is incorporated by reference in section 829. We believe that where a prescription is void, as 21 C.F.R. § 306.04(a) provides, that the appropriate section to be applied is 841.

the meaning of section 841(a), but rather seeks to define the exemption clause of that section.[20]

Although it is probably true that more precise regulations are desirable as to what physicians may or may not do with respect to the exception clause of section 841(a), the present cases are not of the border line variety which had in part motivated Congress to abandon the Harrison Act and enact the Controlled Substances Act.[21] In the present cases there were wholesale sales of prescriptions without even the pretense of a legitimate medical purpose or standard medical procedures. Under these circumstances we find no merit in the defendant's claims that the regulation expanded what was criminal beyond the congressional statute.

V

The defendant Fort in 74-1435, owner of the building that housed the medical center and the Afro-American Pharmacy, challenges his conviction on sufficiency of the evidence grounds. We have reviewed the evidence and find that in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Esquer*, 459 F.2d 431, 433 (7th Cir. 1972), *cert.*

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[20] Even without reference to the regulation the government has sustained its burden in these cases. Section 841(a) makes it illegal to dispense controlled substances except as authorized. The term dispense is defined so as to include the prescribing of a controlled substance by a practitioner which is defined to include a registrant (physician or pharmacist) who acts within the course of professional practice. 21 U.S.C. § 802(10),(20). Since the wholesale selling of prescriptions for controlled substances is beyond the scope of professional practice, a physician (or pharmacist who participates in such a scheme) is not acting as a practitioner. Thus, if such an individual's actions are not that of a practitioner they are not authorized under the subchapter and the exception clause of section 841 does not apply.

[21] *See* note 17, *supra.*

denied, 414 U.S. 1006 (1973), that a sufficient basis exists in the record upon which the jury could reasonably conclude that the defendant Fort had participated in a conspiracy with Dr. Suarez and Green to violate section 841(a).

While the evidence against Fort is not overwhelming, there was sufficient testimony tying him to the prescription sales operation. He was fully aware of the 15 day rule and its operation. He knew that there were exceptions to the rule and that one of these exceptions was Lorenzo Bliss, whom Fort knew personally. Furthermore, Fort not only knew of the direct telephone link-up between the medical clinic and pharmacy, but he expressed disappointment that Dr. Suarez was not making greater use of the line in order that clinic patients would be forced to come to Fort's pharmacy. In addition, Helen Basie testified that to her comment that there were too many people in the clinic and that it could not be possible for that many people to be coming to see this doctor with the same illness and getting the same medication, Fort replied, "Yes, he's getting out of hand."

Other evidence pointing to Fort's involvement in the conspiracy included the fact that Fort had hired security guards for the first and eighth floors. The guards were instructed to make sure that patients did not sell medication in the building. In addition, it was shown that the pharmacy had bought over 1,000,000 Ritalin tablets in an eleven month period, and that on occasion Fort ordered and picked up these supplies. From all this evidence the jury could reasonably conclude that Fort was not a passive part-owner of a pharmacy involved in illegal distribution of controlled substances, but that he knew of and was involved in a concerted effort to violate section 841(a).

VI

The defendant Dr. Leu in addition to the challenges already considered and rejected raises a number of other claims.

A

The defendant contends that the jury instruction on what constituted a defense by a physician to an action under section 841(a) should have been broader than "if the substance is prescribed by him in good faith in medically treating a patient."[22] Initially, the defendant asked for an instruction that would have established a defense on the mere showing that a controlled substance was prescribed by a physician for his patient's own use.

As the district judge correctly observed, the defendant's proffered instruction was too broad and would

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[22] The instruction given read:

Federal law authorizes a licensed physician to prescribe controlled substances of the kinds charged in the indictment, if the drug is prescribed in the course of the physician's professional practice.

The defendant Pay Ming Leu is a licensed physician. It is therefore a defense to the charges in this indictment that the controlled substances were prescribed by him in the course of his professional practice.

A controlled substance is prescribed by a physician in the course of his professional practice, and therefore lawfully, if the substance is prescribed by him in good faith in medically treating a patient.

In order to determine whether or not a prescription or prescriptions were issued in the course of a defendant physician's professional practice, you may consider all of the evidence of circumstances surrounding the prescribing of the substance in question, the statements of the parties to the prescription transaction, any expert testimony as to what is the usual course of medical practice, and any other competent evidence bearing on the purpose for which the substances in question were prescribed.

Unless you find beyond a reasonable doubt that an act of prescribing charged in the indictment against a physician defendant was not done by the defendant physician in the course of his professional practice, then you should find him not guilty.

have taken the heart out of the government's case. The defendant's instruction would have had the effect of applying the *Moore* rationale. We have decided that a prescription issued by a physician that is so far removed from a physician's professional responsibilities (i.e. more than mere technical violations of his authorization) violates section 84(a). The "good faith medical treatment" instruction seems to be an accurate reflection of this holding and in no way was prejudicial to the defendant's case.[23]

B

Defendant Leu was found not guilty of eleven substantive counts, but found guilty of the remaining counts all charging him with attempt to dispense. It is uncontroverted that the prescriptions written by the defendant that from the basis for Counts 12-30 were never filled. Even assuming that a prescription must be filled to complete the crime of dispensing a controlled substance as defined by section 841(a), it seems to us clear that prescription need not be filled to make out a case of attempting to dispense against a physician.

We have previously determined that a physician's authorization which gives rise to an exemption from section 841(a) liability, does not cover the writing of

[23] The defendant also objects to an instruction given by the district judge that defined not only Schedule II and III controlled substances (the basis of the indictment) but also Schedule I substances (not involved in the indictment). The purpose of giving the definition of a Schedule I substance (high potential for abuse and no currently accepted medical use) was because the definition of Schedule I is referred to in the definition of Schedule III. It is clear that the defendant was not prejudiced by this instruction. The instruction as given was an accurate statement of the law as set out in 21 U.S.C. § 812 and the judge not only informed the jury why he was reading them the definition of Schedule I substances, but also advised them that this case involved no such substances.

prescriptions outside the course of one's professional practice. In the present case the proof shows that the defendant wrote and sold prescriptions to individuals outside the scope of his professional duties. When this occurred the defendant-physician had completed all the elements of the offense that he would ever commit and that were within his control. As far as Dr. Leu was concerned, the crime had been completed. If for some reason it was not in actuality completed, it was because of "factual" and not "legal" impossibility, and therefore not a sufficient defense to an attempt charge. *United States* v. *Heng Awkak Roman*, 356 F. Supp. 434 (S.D.NY.), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978 (1974). This is not a case of "mere preparation" but rather one of attempt to commit the crime of dispensing. Here we have "the commission of an overt act, the 'doing something directly moving toward, and bringing him nearer the crime he intends to commit.'" *United States* v. *Noreikis*, 481 F.2d 1177, 1181 (7th Cir. 1973). As the court said in *United States* v. *Mandujano*, 499 F.2d 370 (5th Cir. 1974):

> First, the defendant must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting. . . .
>
> Second, the defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime. A substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent.

Id. at 376.

The foregoing test was clearly met in this case.[24]

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[24] As an offshoot to this argument the defendant argues that since the jury found him not guilty of Counts 1-11, and that at least some of the elements involved in these acquittals were involved in the remaining attempt counts, that the verdicts are inconsistent. Merely because incon-

C

The defendant complains that the expert testimony of Dr. Howard D. Kurland as to customary procedures followed by licensed medical physicians in treating a new patient prior to prescribing a controlled substance as medication invaded the province of the jury.

While it may be true that an expert should not be allowed to express a conclusion upon the ultimate issue of fact to be decided by the jury, *United States* v. *Spaulding*, 293 U.S. 498 (1935), the testimony of Dr. Kurland in the present case was entirely proper. Here Dr. Kurland merely testified as to what customary medical procedure was generally followed before the prescribing of drugs. He did not comment on whether the procedures followed by the defendant were appropriate, given the individual nature of his patients' conditions. That question was properly left for the jury's determination. Testimony as to the traditional procedures and techniques to be followed by a physician in a given set of circumstances is entirely permissible by a witness who is qualified as an expert in the medical field. *United States* v. *Bartee*, 479 F.2d 484, 488 (10th Cir. 1973); *Heller* v. *United States*, 104 F.2d 446, 449 (4th Cir. 1939).

In addition, the trial judge gave LaBuy instruction 6.16-1 which advised the jury that an expert's opinion need not be accepted by them. We conclude, therefore, that the defendant has shown no prejudice caused by the admission of Dr. Kurland's testimony.

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[24] (Continued)
sistent verdicts are rendered does not necessarily require a reversal. *United States* v. *Greene*, 497 F.2d 1068 (7th Cir. 1974). In this case, however, the verdicts are not inconsistent. The attempt counts charge the defendant Leu with selling of prescriptions on entirely different occasions than do the first eleven substantive counts. Furthermore, as compared to the first eleven counts the proof on the attempt counts showed more dramatically that no legitimate medical purpose was involved (i.e. more frequent intervals and wholesale use of fictitious names).

D

Dr. Leu further contends that he was denied a fair trial because of adverse pre-trial publicity. The defendant claims that news stories reporting his indictment and the trial of Dr. Suarez served to prejudice him. We note that most of the stories complained of were published or broadcast five months before defendant's trial, and accounts of Dr. Suarez' trial were published approximately six weeks before the start of Dr. Leu's trial.[25] At the voir dire it was established that the jurors had never heard of Dr. Leu or anything about this case. In addition, at the close of the evidence the jury was instructed to consider only the evidence presented in the courtroom and to disregard any press, television or radio reports they might have seen or heard. Considering the specific facts of this case, the intensity of the exposure and the nature of the publicity, we conclude that the publicity attendant with this trial was minimal and clearly does not warrant either a reversal or remand. *United States* v. *Barrett*, 505 F.2d 1091, 1100 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3438 (U.S. Feb. 11, 1975).

E

Finally, we have examined defendant Leu's sufficiency of the evidence argument and we find it without merit. As the facts summarized in part II, *supra*, indicate, there was clearly a sufficient basis to support the jury's verdict.

We have examined all of the defendant's other contentions of error and find them unpersuasive.

For the foregoing reasons the judgments of the district court in both cases are affirmed.

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[25] The fact that Dr. Suarez was sentenced during the trial of Dr. Leu does not establish substantial prejudice. Indeed, except for the bald assertion that the Suarez sentencing coincided with the Leu trial, the court's attention is not directed to any specific articles or broadcasts that contain anything more than a bare reporting of the facts.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

March 18, 1975

Before

HON. THOMAS E. FAIRCHILD, *Chief Judge*

HON. JOHN PAUL STEVENS, *Circuit Judge*

HON. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 74-1420, 74-1468 *vs.* PAY MING LEU, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (74 CR 343)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1461

PAY MING LEU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner, a medical doctor, was convicted of nineteen counts of attempting to dispense Schedule II and III controlled substances by means of prescriptions issued outside the course of professional practice, in violation of 21 U.S.C. 841(a)(1) and 846. At the same time, he was acquitted of eleven counts of dispensing Schedule II and III controlled substances outside the course of professional practice, contrary to 21 U.S.C. 841(a)(1).[1] Petitioner was sentenced to five con-

[1]Counts 1 through 11 of the indictment charged petitioner with unlawful dispensing, while counts 12 through 30 charged that on separate occasions he had attempted unlawfully to dispense. The controlled substances involved in the indictment were Ritalin, containing methylphenidate, a Schedule III substance; Seconal, containing secobarbital, a derivative of barbituric acid, a Schedule III substance; Tuinal, containing sodium amobarbital and sodium secobarbital, Schedule III substances; and Desoxyn, containing methamphetamine, a Schedule II substance. While the indictment and the court's instructions erroneously indicated that methylphenidate and barbituric acid were Schedule II rather than Schedule III controlled substances, petitioner has alleged no prejudice from this variance and we can perceive none.

secutive one-year prison terms, to be followed by three years' special parole. The court of appeals affirmed on February 27, 1975 (511 F.2d 1062; Pet. App. 1a-22a) and denied rehearing on March 18, 1975 (Pet. App. 23a). The petition for a writ of certiorari was filed on May 21, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court.

The testimony of three undercover agents of the Drug Enforcement Administration and an agent of the Illinois Legislative Investigating Commission showed that between April and September, 1973, petitioner repeatedly prescribed controlled substances in a manner inconsistent with any legitimate medical purpose.

Agent Bernard Ward testified that on his first visit to petitioner, he asked for $100 worth of Ritalin. Petitioner said that he could only give him a prescription for 90 pills for which Ward paid petitioner $20. Five days later, Agent Ward requested but was refused another prescription for Ritalin because, as petitioner explained, it was "too early." Ward then asked for Seconal and received a prescription for a similar drug, Tuinal, petitioner advising him that he would "have to take whatever is given" (Tr. 17-24). On Ward's fourth visit, petitioner advised him that "prices may go up" in the future (Tr. 28-29). On no occasion did petitioner give Ward a physical examination or take his medical history (Tr. 29).

Agent Kenneth Adams testified that he received a prescription for 90 Ritalin pills after telling petitioner that, contrary to a written notation by petitioner's receptionist, he was not "kicking any habit" but wanted the Ritalin to get high at a party. Adams paid $20 for the prescription (Tr. 52). On his next visit Adams received prescriptions for Ritalin and Seconal (Tr. 56).

Agent Edward Doyle went to petitioner in September, 1973, and told him that since July, when he had last seen petitioner, he had been in Canada selling methylphenidate

(the active ingredient in Ritalin) (Tr. 181). Petitioner wrote Doyle a prescription for Desoxyn in the name of Eddie DeGrazia, Doyle's undercover name. Petitioner explained that he could not simultaneously write a prescription for Ritalin to the same person, so he wrote it in another name which he knew was fictitious (*ibid.*). He described the transaction to Doyle as "cash and carry" and charged him $25 for each prescription.

Petitioner asked Doyle which of the drugs was better. Doyle replied that he did not know since he did not personally use the Ritalin but sold it (Tr. 182). Petitioner then remarked: "Everybody has to make a living" (*ibid.*). In a later conversation about Doyle's trafficking, petitioner cautioned him to be careful of the police (Tr. 196). Petitioner never gave Doyle a physical examination or took his medical history (Tr. 197-198).

Agent Eddie Brown received prescriptions from petitioner at intervals ranging from two days to 2 1/2 months using the names of Eddie Brown, Arnie Wilson, Bonnie Hill, Billy or Lenora Brown, Lenora Wilson and Glenn Gray. On one visit, Agent Brown requested prescriptions for Ritalin and Seconal because he was having a party (Tr. 87). On a later visit, he told petitioner that he was selling the drugs petitioner was prescribing for him (Tr. 117).

Petitioner issued the Ritalin prescriptions to Brown and others on prepared forms requiring only the name and signature of the recipient. Frequently petitioner's security guard would enter the purchaser's name; but when petitioner issued prescriptions in two different names simultaneously, he entered the names himself (Tr. 111, 121).

1. Petitioner contends that as a registered physician he is immune from prosecution under 21 U.S.C. 841(a)(1).[2]

[2]While petitioner raises this issue somewhat obliquely (see Pet. 3), his argument in behalf of "medical freedom" (Pet. 11) and his reference to *United States* v. *Moore*, 505 F.2d 426 (C.A. D.C.), certiorari granted, 420 U.S. 924 (Pet. 11), suggest a claim that Congress did not intend physicians to be subject to prosecution under Section 841(a)(1).

This issue is presently before this Court in *United States* v. *Moore*, certiorari granted, 420 U.S. 924.[3] Accordingly, we suggest that the Court hold the instant petition pending its decision in *Moore*.[4]

Petitioner's remaining contentions are without merit.

2. Petitioner claims that his convictions for attempting to dispense controlled substances are invalid because the government agents made no effort to fill the prescriptions that were the basis of those convictions. He reasons that, because "dispense" means to "deliver a controlled substance * * * " (21 U.S.C. 802(10)), a prerequisite to his conviction for attempted unlawful dispensing was an attempt by the recipients of the prescriptions to obtain delivery of controlled substances.

However, 21 U.S.C. 802(10) expressly defines "dispense" as "including the prescribing" as well as the sale of controlled substances.[5] Thus, insofar as a physician is concerned, the act of dispensing is complete when he issues a prescription. Accordingly, petitioner could properly

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[3]Petitioner was convicted of violating 21 U.S.C. 846, which provides for punishment of any person "who attempts or conspires to commit any offense defined in this subchapter * * * ." However, because he was charged with attempting to violate 21 U.S.C. 841(a)(1), the necessary predicate for his conviction is that he was not immune from prosecution under Section 841(a)(1)—the issue before the Court in *Moore*.

[4]We are sending a copy of our brief in *Moore* to petitioner's counsel.

[5]21 U.S.C. 802(10) provides:

> The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

have been charged with actual dispensing even though the prescriptions he issued to the agents were not presented for filling.[6]

In any event, the court of appeals correctly held that petitioner's convictions of attempting unlawfully to dispense did not depend on whether the prescriptions were later presented for filling. As the court stated (Pet. App. 20a), when petitioner "wrote and sold prescriptions to individuals outside the scope of his professional duties," he (*ibid.*)

> had completed all the elements of the offense that he would ever commit and that were within his control. As far as Dr. Leu was concerned, the crime had been completed. If for some reason it was not in actuality completed, it was because of "factual" and not "legal" impossibility, and therefore not a sufficient defense to an attempt charge. *United States* v. *Heng Awkak Roman*, 356 F. Supp. 434 (S.D.N.Y.), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978 (1974). This is not a case of "mere preparation" but rather one of attempt to commit the crime of dispensing. Here we have "the commission of an overt act, the 'doing something directly moving toward, and bringing him nearer the crime he intends to commit.'" *United States* v. *Noreikis*, 481 F.2d 1177, 1181 (7th Cir. 1973).

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[6]As we explain in our brief in *Moore* (p. 24, n. 21) and in our memorandum in *Rosenberg* v. *United States*, pending on petition for a writ of certiorari, No. 74-1367, (pp. 4-5) (a copy of which we are sending to petitioner's counsel), it is our view that dispensing is lawful under the Controlled Substances Act when done pursuant to a lawful order of a practitioner "in the course of professional practice." See 21 U.S.C. 802(10), 802(20). Thus a physician who prescribes or administers drugs other than for a professional purpose is properly charged with unlawful "distributing" —that is, delivery "other than by administering or dispensing" (21 U.S.C. 802(11))—rather than with "dispensing." See *United States* v. *Rosenberg*, 515 F.2d 190, 200 (C.A. 9); *United States* v. *Black*, 512 F.2d 864, 866 (C.A. 9); *United States* v. *Badia*, 490 F.2d 296,

3. Petitioner's contention that his acquittal on the counts charging actual dispensing "precluded" his conviction on the attempt counts was answered by the court of appeals (Pet. App. 21a, n. 24):

> The attempt counts charge the defendant Leu with selling of prescriptions on entirely different occasions than do the first eleven substantive counts. Furthermore, as compared to the first eleven counts the proof on the attempt counts showed more dramatically that no legitimate medical purpose was involved (i.e. more frequent intervals and wholesale use of fictitious names).[7]

4. Petitioner claims that he was prejudiced by a jury instruction defining Schedule I controlled substances, when the charges against him related only to Schedule II and III controlled substances. The court of appeals properly rejected this claim (Pet. App. 19a, n. 23):

> The purpose of giving the definition of a Schedule I substance (high potential for abuse and no currently accepted medical use) was because the definition of Schedule I is referred to in the definition of Schedule III. It is clear that the defendant was not prejudiced by

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298 and n. 4 (C.A. 1). But see *United States* v. *Leigh*, 487 F.2d 206 (C.A. 5).

While petitioner here was charged with attempting unlawfully to dispense rather than with attempting unlawfully to distribute, he did not raise below, nor does he present for review here, the issue whether a physician can properly be charged with unlawful dispensing rather than distributing. In any event, there is no fatal variance between proof of unlawful distributing by means of prescriptions issued outside the course of professional practice and the charge of unlawful dispensing based on commission of the same acts. In substance, the charge against petitioner was that he had issued prescriptions outside the course of professional practice, in violation of 21 U.S.C. 841(a)(1) (which proscribes both unauthorized "dispensing" and "distributing"). Petitioner's defense was that as a physician he could not be convicted under that statute so long as he wrote facially valid prescriptions (see Pet. App. 18a-19a). Accordingly, he fully understood the charge against him and was not prejudiced by the use in the indictment of one term rather than the other.

[7]The proof relating to the attempt counts consisted primarily of the sales to Agents Brown and Doyle described earlier.

this instruction. The instruction as given was an accurate statement of the law as set out in 21 U.S.C. §812 and the judge not only informed the jury why he was reading them the definition of Schedule I substances, but also advised them that this case involved no such substances.

5. Petitioner argues that he was denied a fair trial because of adverse publicity, namely, news stories reporting the trial and sentencing of Dr. Valeriano Suarez, who had been convicted earlier of violating 21 U.S.C. 841(a)(1).[8] The court of appeals answered this claim as follows (Pet. App. 22a and n. 25):

> The defendant claims that news stories reporting his indictment and the trial of Dr. Suarez served to prejudice him. We note that most of the stories complained of were published or broadcast five months before defendant's trial, and accounts of Dr. Suarez' trial were published approximately six weeks before the start of Dr. Leu's trial.[25] At the voir dire it was established that the jurors had never heard of Dr. Leu or anything about this case. In addition, at the close of the evidence the jury was instructed to consider only the evidence presented in the courtroom and to disregard any press, television or radio reports they might have seen or heard. Considering the specific facts of this case, the intensity of the exposure and the nature of the publicity, we conclude that the publicity attendant with this trial was minimal and clearly does not warrant either a reversal or remand. *United States* v. *Barrett*, 505 F.2d 1091, 1100 (7th Cir. 1974), [certiorari denied, No. 74-950, May 12, 1975].

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[8] The appeals of Suarez, Clifford T. Green, and Henry G. Fort were consolidated with petitioner's and their convictions also were affirmed. See 511 F.2d 1062; Pet. App. 1a-22a. Their petition for a writ of certiorari is pending in *Clifford T. Green, et al.* v. *United States*, No. 74-1233.

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[25]The fact that Dr. Suarez was sentenced during the trial of Dr. Leu does not establish substantial prejudice. Indeed, except for the bald assertion that the Suarez sentencing coincided with the Leu trial, the court's attention is not directed to any specific articles or broadcasts that contain anything more than a bare reporting of the facts.

6. Finally, petitioner contends that once he learned from the government's bill of particulars that part of the government's proof would be his knowing use of pseudonyms in issuing prescriptions, he was entitled to know the true names of the agents to whom he had issued the prescriptions in order to counter that proof. Petitioner never expressly made such a request in the trial court, and the trial judge denied his general pretrial request for a list of the government's witnesses, finding no special need for such disclosure.[9] Moreover, petitioner had been given copies of each prescription that was the subject of a count in the indictment and a compilation of statements that he had made to the agents during each alleged transaction—statements that made clear those instances in which the government would rely in part upon his use of fictitious names. Thus, petitioner was given ample material before trial to prepare his defense to this aspect of the government's proof.

[9]Rule 16, Fed. R. Crim. P., does not require pretrial disclosure of names and addresses of witnesses; such disclosure is required only in capital cases. See 18 U.S.C. 3432. The bill amending the Rules recently signed by the President does not change Rule 16 in this regard. See H.R. 6799, 94th Cong., 1st Sess.

It was not error for the court to refuse to order disclosure of the names of the agents.[*]

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Moore*, and then disposed of in accordance with that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[*]Petitioner's related claim that the government turned the investigation of his activities into a "sporting event" by using undercover agents with aliases is fully answered by the evidence of his own resort to fictitious names to disguise the sale of prescriptions. Moreover, we know of no prohibition on the government from using undercover agents who attempt to disguise their identities as law enforcement officers in the investigation of crime. Cf. *United States* v. *Russell*, 411 U.S. 423, 432-436.